IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 10/09/2003

Coram

The Honourable Mr. Justice V.S.SIRPURKAR
and
The Honourable Mr. Justice AR. RAMALINGAM

W.A. No.1206 OF 2003

Sundaram Finance Limited ..... Appellant

-Vs-

1. Kamaraj National Labour Organisation
rep. by its District Representative
Coimbatore

2. The Board for Industrial and
Financial Reconstruction
Jawahar Vyapar Bhavan
Tolstoy Marg
New Delhi

3. The Coimbatore Pioneer Mills Limited
rep. by its Managing Director
Coimbatore

4. Industrial Development Bank of India
rep. by its Deputy General Manager
IDBI Tower, WTC Complex
Cuffe Parade
MUMBAI 400 005

5. Sri A. Kumar
Advocate Commissioner
163 Addl. Law Chambers
High Court Buildings
Chennai ..... Respondents

Appeal under Cl.15 of the Letters Patent against the order
dated 21-2-2002 passed in WPMP No.93 of 2003 and WVMP No.40 of 2003
in W.P. No.79 of 2003

!For Appellant :: Mr. M.S. Krishnan

^For Respondents :: M/s. N.G.R. Prasad and
Chandrasekaran

:JUDGMENT
(Delivered by V.S. SIRPURKAR, J.)

Appellant herein challenges the order dated 21-2-2003 passed by the learned single Judge while disposing of the W.P.M.P. No.93 of 20 03 and W.V.M.P. No.40 of 2003 in W.P. No.79 of 2003. By the instant order, the learned single Judge has confirmed the stay orders granted on 2-1-2003 and 10-1-2003. It is an admitted position that the writ petition, W.P. No.79 of 2003 and the other connected writ petitions, W.P. Nos.972 to 974 and 1526 of 2003, are on the identical subject but, filed by different Trade Unions.

2. In the present writ petition, viz. W.P. No.79 of 2003, the petitioner-Union challenged the order passed by the Board for Industrial and Financial Reconstruction (in short "BIFR") dated 23-4-2002 in BIFR Case No.103 of 1998 and the consequential sale notice thereto. The prayer in this writ petition is as follows:
"... to issue appropriate writs, orders or directions and more particularly a writ in the nature of Certiorarified Mandamus and after calling for the records relating to the proceedings of the first respondent dated 23-4-2002 in so far as it grants permission to sell the machinery and the consequential sale notice issued by the fifth respondent published in The Hindu dated 16-12-2002 and quash the same as being illegal, arbitrary and unconstitutional and consequently direct the first respondent BIFR to go ahead with the Rehabilitation Scheme prepared pursuant to its proceedings dated 23-4-2002 and pass such other orders ..."
In short, the contention of the petitioner-Union and the other Trade Unions was that there are about thousand workers working in the Coimbatore Pioneer Mills Limited, third respondent in this appeal, (in short 'the sick mill') and that the said Trade Unions were representing a few of those workers.

3. It is stated in the affidavit filed in support of the present writ petition that the third respondent mill was incorporated in the year 1935 and the total number of workers was about 1000 and that the mill had become sick and therefore, an application came to be filed before the BIFR, which was registered as Case No.103 of 1998. It is then pointed out that on 10-6-1998, the company was declared as sick industrial company under Sec.3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985 (in short 'SICA'). It is then pointed out that the operating agency was directed to submit the modified draft rehabilitation scheme to the BIFR on 25-5-2000 and the company had requested the Board not to wind up the mill in public interest in view of their compliance of the directions given by the BIFR so far. It is then stated in paragraph 3 as under:
"However in paragraph 18 of the proceedings, the Board granted permission to the secured creditors to initiate/pursue their recovery suits on condition that decrees if any granted shall not be executed without prior permission of the Board. The Board observed that this decision will not cause any prejudice to the Company's interest, while safeguarding the interests of the secured creditors."
It is then contended in the very next sentence that in pursuance of this proceedings, this Hon'ble Court, by its order dated 29-11-2002, in Application Nos.2005 to 2010 of 2001, directed the Advocate Commissioner to sell the

machinery in as is where is condition which are located in A, B & C units of the company. It is then pointed out that the Advocate Commissioner had issued a sale notice in The Hindu on 16-12-2002, which was sought to be quashed by the petitioner in the present writ petition.

4. On the basis of this, it seems, an interim order came to be passed initially on 2-1-2003 by the learned single Judge and as a result of this, the present appellant filed an application for vacating the stay, which application was dismissed by the learned single Judge, confirming the order of interim stay granted on 2-1-2003 and 10-1-2003 .

5. The learned single Judge has taken the view that if the machinery in question is sold out in pursuance of the sale notice then, there would remain nothing in the mill and the whole spinning operation of the mill will come to a grinding halt in which case, the workers employed in the sick mill would be deprived of their livelihood. On the other hand, the fourth respondent finance company, appellant herein, being the secured creditors, would be able to recover their dues from the sick mill in case the mill continues to run. The learned single Judge has taken into consideration the fact that the mill is a running-mill.

6. It is against this order, the present writ appeal has been filed.

7. Shri M.S. Krishnan, learned counsel appearing on behalf of the appellant, has systematically taken us through the whole history of this litigation and contends that the impugned order is completely oblivious of the jurisdictional aspects as also the factual aspects. Learned counsel points out that the writ petition itself was not maintainable at all and if at all it was maintainable, it has been maintained on the basis of the totally incorrect facts, which facts, though pointed out to the learned single Judge by way of the counterpetition, have been left out of consideration by the learned single Judge. Learned counsel says that on that account the order is completely erroneous and is liable to be set aside.

7.1. Learned counsel firstly points out that the appellant is a non-banking financial company and it had entered into three hire purchase agreements, dated 31-8-1995, 31-3-1997 and 17-5-1997, with the sick-mill. These were the agreements for the machinery, which were hired to the sick-mill. However, there were defaults in the payment of the instalments. The first legal notice came to be served on 20-9-1999. It is then pointed out that the sick-mill admitted the liability in its reply dated 5-10-1999. Ultimately, finding that the sick-mill was not prepared to honour its commitments and went upon to commit further defaults in payment of instalments, applications (A.Nos.2005 to 2010 of 2001) under Sec.9 of the Arbitration and Conciliation Act, 1996 came to be filed before the Original Side of this Court, seeking re-possession of the hired machinery. Learned counsel points out that under the hire purchase agreements, there was a specific clause that if there was a default in payment of instalment then, there could be re-possession of the machinery. Learned counsel further points out that these applications came to be filed because the hire purchase

agreements contained an arbitration clause also and in pursuance of that, the appellant sought to secure its interests by seeking re-possession of the hired machinery.

7.2. It is then pointed out that on 25-4-2001, an order came to be passed by the learned single Judge, sitting on the Original Side of this Court, granting the applications. In that, the learned single Judge directed that an warrant of Advocate Commissioner should be issued under the seal of this Court for taking possession of the hired machinery.

7.3. It is then pointed out that this order again came for consideration at the instance of the sick-mill, which appeared before the learned single Judge and tried to stall the re-possession of the hired machinery by offering to pay the defaulted amounts. Therefore, ultimately an order came to be passed on 30-5-2001 wherein the learned single Judge directed the suspension of the earlier order dated 25 -4-2001 on condition that the sick-mill should pay a sum of Rs.84,00,000/- being the arrears of instalments within a period of three months from 30-5-2001 and should continue to pay a sum of Rs.8,00,000/- per month commencing from 1-6-2001 onwards. The learned single Judge also clarified that any default would entail the vacation of the order of suspension automatically.

7.4. Learned counsel then points out that though initially some payments were made, defaults were again committed by the sick-mill and, therefore, by order dated 15-10-2001, a warrant came to be issued by this Court, after appointing an Advocate Commissioner, to take possession of the hired machinery.

7.5. The Advocate Commissioner tried to take possession of the hired machinery but could not do so due to the tactics adopted by the sick-mill and, therefore, he filed a report on 29-11-2002 suggesting the sale of machinery, which suggestion was accepted by the Court and the Advocate Commissioner was permitted to continue further works and granted two months' time to complete the work of publication of sale notice, etc. and sell the machinery to the highest bidder without dismantling the same. This was probably felt necessary because, in the opinion of the Advocate Commissioner if the hired machinery were to be dismantled for the purpose of sale, their value would have been substantially reduced and, therefore, it was proposed to sell the hired machinery in the same condition that they were in. It is at that point of time, the present writ petitions came to be filed by the different Trade Unions, which were registered as W.P. No.79, 972 to 974 and 1526 of 2003.

7.6. Learned counsel points out that a completely misleading statement was made before the Court that the sale notice issued by the Advocate Commissioner was in pursuance of the order passed by the BIFR and, therefore, the order of the BIFR needed to be corrected by this Court in its extraordinary original jurisdiction under Art.226 of the Constitution. Learned counsel points out that it was nowhere pointed out in any of the affidavits filed in support of the writ petitions that the sale notice was in pursuance of the order passed by the BIFR. On the other hand, the sale notice was in pursuance of the orders passed by this Court in A.Nos.2005 to 2010 of 2003 and which orders were crystallised further by the order dated 30-5-2003 by which the Advocate Commissioner was permitted to pursue the course for which he was appointed. Learned counsel, therefore, points out that there was no question of entertaining the writ petition against the order of the learned

single Judge sitting on the Original Side of this Court and even assuming that the writ petition was maintainable, the petitioner were guilty of suppressio veri and suggestio falsi of material facts and as such the writ petition was bound to be dismissed in limine.

7.7. Learned counsel points out that there was absolutely no question of there being any nexus of these proceedings with the proceedings before the BIFR and for that matter took us through the original order passed by the BIFR dated 23-4-2002. According to the learned counsel that order, more particularly paragraph 18 thereof, as referred to in the writ petition filed by the first respondent Trade Union nowhere grants any such permission even by distant implication.

7.8. For all these reasons, the learned counsel pointed out that there would be no question of firstly entertaining the writ petition, secondly, granting any stay and thirdly, confirming the same.

7.9. Learned counsel also takes us on the further legal aspect of the matter. He points out that the appellants were recovering their own property. This the learned counsel reiterates that under the hire purchase agreements, it was an admitted position that till such time all the instalments were finally paid, the ownership of the hired machinery was to be that of the appellant company and not of the sick-mill. According to the learned counsel since the proceedings under Sec.22 of SICA pertain only to the property belonging to the sickmill, there would be no question of the machinery of the appellant company, which were hired to the sick-mill, being in any way connected with the proceedings before the BIFR and, therefore, the BIFR would have no jurisdiction whatsoever in so far as the machinery of the appellant company is concerned. For this purpose, learned counsel relied on the Division Bench judgment of this Court in Shri Ananta Udyog Private Limited v. Cholamandalam Investment & Finance Company Limited (1995 I CTC 206).

8. As against this, M/s. N.G.R. Prasad and Chandrasekaran, learned counsel appearing for the first respondent Trade Union very earnestly point out that the view taken by the learned single Judge in confirming the stay order was well justified particularly, in view of the humanitarian angle that in case the machinery in question were directed to be sold out, the running of the mill will come to a grinding halt, which would deprive the livelihood of one thousand of workers and their family. Learned counsel earnestly urged that the question involved herein pertains to the existence of the families of about one thousand workers and, therefore, the learned single Judge has taken a correct view of the matter, balancing the equities of the sick-mill on the one side, one thousand workers on other side as also the interests of the appellant on the third side, if there is any third side attached to the matter. Learned counsel further point out that there was no question of any material suppression because the petitioner Union did not know of the pending proceedings and had no nexus whatsoever with the proceedings which were started by the appellant under Sec.9 of the Arbitration and Conciliation Act. Therefore, according to the learned counsel, even if there was any such material suppression, it was not intentional and it was only due to the fact the petitioner Union had no way to know as to what transpired before the sale notice was issued by the Advocate Commissioner.

9. On consideration of the rival submissions, it is

clear that there has been a complete misunderstanding on the part of the learned single Judge in firstly entertaining the writ petition. It is a trite position in law that equities are not allowed to bypass the law. That is precisely the contention raised by the learned counsel for the appellant. We have perused the order of the BIFR and we do not find that the sale has been ordered in the proceedings before the BIFR at all. At any rate, considering the law laid d own by this Court in Shri Ananta Udyog case, cited supra, with which we respectfully agree, there was no question of BIFR issuing any such direction or permission for the sale of the hired machinery which did not belong to the sick-mill. There can be no question that ownership would get transferred in favour of the hirer in the absence of any prior agreement to that effect between the parties. It is not as if the property cannot be transferred. It could be so transferred provided there is an agreement to that effect. Learned counsel for the appellant is at pains to point out that the hire purchase agreements specifically that the ownership would not transfer in favour of the hirer unless and until the payment of all the instalments is made and honoured by the hirer. Therefore, there was no question of the property being transferred in favour of the sick-mill and in that case the position will be clear that the ownership of the hired machinery will still remain with the appellant company and, therefore, it will be outside the mischief of Sec.22 of SICA and would eventually be outside the jurisdiction of the BIFR altogether. Once that position is clear, it will be crystal clear that the order for sale of the machinery did not emanate out of the proceedings before the BIFR and it indeed could not have been so yet, a submission came to be made that the sale of the machinery was in pursuance of the order dated 23-4-2002 passed by the BIFR. We have already reiterated that we do not find anything in the BIFR's order to that effect.

10. On the other hand, the claim made by the learned counsel for the appellant that the sale notice emanated out of the order passed by the learned single Judge, sitting on the Original Side of this Court, in the A.Nos.2005 to 2010 of 2001 has not been refuted at all by the learned counsel for the first respondent Union and in our opinion rightly so. Once that position is clear, the very basis of the writ petition is knocked out and the very basis of the rationale used by the learned single Judge is also knocked out because if the writ petition itself was based on the incorrect factual basis then, it could not be allowed to stand much less under orders of the nature concerned herein could be allowed to emanate from such a writ petition. In that view, we are of the clear opinion that the consideration shown by the learned single Judge for the families of one thousand workers, though a genuine consideration, would not come in the way of the appellant to succeed. Under any circumstance, could the order passed by the learned single Judge, sitting on the Original Side of this Court, be set aside by taking recourse to the constitutional remedies be permitted much less under the factual circumstances which we have depicted. We are hasten to add that we do not say that the writ petition was not maintainable at all. However, atleast on the facts stated before the learned single Judge, it could not have been entertained. In that view, the appeal must succeed. We set aside the order of the learned single Judge and order the dismissal of the stay petition, W.P.M.P. No.93 of 2003 and allow the vacate-stay petition, W.V.M.P. No.40 of 2003 in W.P. No.79 of 2003. Connected W.A.M.P. No.1512

of 2003 is closed.

Index:Yes
Website:Yes

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To:

1. The Board for Industrial and
Financial Reconstruction
Jawahar Vyapar Bhavan
Tolstoy Marg
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2. Deputy General Manager
Industrial Development Bank of India
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